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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 71-420

RALPH D. CRABTREE

Petitioner

v.

BOARD OF EDUCATION,
WELLSTON CITY SCHOOL DISTRICT, ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

LUCAS, PENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN
RANKIN M. GIBSON, ESQ.
42 East Gay Street
Columbus, Ohio 43215
Attorneys for Petitioner

JOSEPH A. OTHS, ESQ.
16 East Broadway
Wellston, Ohio 45692
Attorney for Respondent, Board of Education

M. D. SLAVENS, ESQ.
167 Broadway
Jackson, Ohio 45640
Attorney for Respondent, Jasper C. Call

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, Ralph D. Crabtree, prays for a writ of certiorari to review the orders of the Supreme Court of Ohio entered May 26, 1971, overruling his motion to certify and dismissing, sua sponte, his appeal of right from the judgment entered on January 8, 1971, by the Court of Appeals for Jackson County, Ohio, affirming the judgment of the Court of Common Pleas of Jackson County, Ohio, in Case No. 19481. The Supreme Court of Ohio overruled petitioner's motion for rehearing on June 30, 1971.

OPINION BELOW

The Supreme Court of Ohio wrote no opinion. The Court of Appeals for Jackson County, Ohio, rendered a written decision on January 8, 1971 (Appendix A, *infra* pp. 16-22), which was not reported. Subsequent to January 14, 1971, when petitioner filed his notice of appeal to the Supreme Court of Ohio, the Court of Appeals for Jackson County, Ohio, rendered another written decision, which is reported in 26 Ohio App. (2d) 237.

JURISDICTION

The orders of the Supreme Court of Ohio entered on May 26, 1971, overruling the petitioner's motion for an order directing the Court of Appeals for Jackson County, Ohio, to certify its records (Appendix B, *infra*, p. 23) and dismissing, sua sponte, the appeal of right (Appendix C, *infra*, p. 24) are attached hereto. The jurisdiction of this Court is invoked under Rule 19 of this Court and 28 U.S.C. 1257 (3), which provide for review of final judgments rendered by the highest court of a state by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

QUESTION PRESENTED

Is a teacher deprived of his property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States where a board of education terminates the employment of such teacher who has been employed by such board for nine years, holds the degree of Master of Education and holds a professional high school teaching certificate, following a meeting of such board not in accordance with state law, without giving such teacher reasons for his discharge, or a hearing at which the teacher can present evidence relating to such reasons, if any, prior to such termination?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional and statutory provisions involved herein is contained in Appendix E, *infra*, p. 32. These relevant provisions are:

Fourteenth Amendment to Constitution of the United States; Sections 3313.18, 3313.22, 3313.23, 3313.26, 3319.08, 3319.11 of the Revised Code of Ohio.

STATEMENT OF THE CASE

On May 6, 1970, petitioner filed his petition (Appendix D, *infra*, pp. 26-31) in the Court of Common Pleas, Jackson County, Ohio, against the Board of Education, Wellston City School District, the members and Clerk-Treasurer thereof, hereinafter referred to as respondents, praying for a temporary and permanent injunction. Petitioner sought an order enjoining the respondents, and each of them, from

(1) reading, approving and attesting the minutes of the April 13, 1970, meeting of the Board of Education;

(2) declaring the notice of intention not to re-employ petitioner by the respondent, Board of Education, dated April 14, 1970, void and without effect;

(3) declaring that the petitioner be deemed re-employed under a continuing contract at the same salary, plus any increment provided by the salary schedule; and

(4) that the respondents, and each of them, be enjoined to do or refrain from doing or performing any and all acts or omissions necessary and proper to implement the restraints and orders.

On Friday, May 8, 1970, prior to the regular meeting of the Board of Education on Monday, May 11, 1970, the cause came on for hearing, pursuant to notice given, upon petitioner's motion for temporary injunction.

On the basis of factual allegations contained in petitioner's positively verified petition, the admissions of the truth of the facts stated in the petitioner's petition by the respondent, Jasper C. Call, member of the Wellston City Board of Education and his consent to the entry of an injunction as prayed for, and the oral motion of the other respondents for an order dismissing the petition, the state trial court found the facts to be as alleged in the petition. The trial court also found that, under the law and the facts, petitioner was not entitled to an injunctive order of any character. Accordingly, the trial court entered a judgment in favor of the respondents other than Jasper C. Call, and dismissed the petition at the petitioner's costs.

When this action was filed, the petitioner was employed as a a teacher by the respondent, Board of Education, in the Wellston City School District, and had been so employed for the past nine years. The petitioner holds a degree of Master of Education from Ohio University. He also holds a professional high school certificate, No. 296-28-6840-8C, issued by the State

Department of Education which is valid for eight years from and after September 1, 1968. When the action was filed, petitioner was employed under a limited teacher's contract for a three year period commencing in 1967 and ending June 30, 1970.

At the April 13, 1970, meeting of the Board of Education, the Superintendent of the Wellston City Schools refused to recommend that petitioner be re-employed. The respondent, Betty Saltsman, Clerk-Treasurer of the Board, was absent from the April 13, 1970, meeting of the respondent, Board of Education. Members of the Board of Education present at that meeting did not choose one of their members to serve as Clerk *pro tempore*. Notations of the meeting were then and there taken by Mary Riley.

Section 3313.22, Revised Code of Ohio, requires that the board of education of each local, exempted village, and city school district elect a clerk. By statute, the clerk is given a variety of fiscal, secretarial and financial duties. Thus, by Section 3313.18, Revised Code of Ohio, the clerk is required to publicly call the roll of the members composing the board and enter on the record the names of those voting "aye" and the names of those voting "no". By the same section of the Code, upon any motion or resolution, a member of the board may demand the yeas and nays and the clerk is required to call the roll. By Section 3313.26, the clerk must record the proceedings of each meeting in a book to be provided by the board for that purpose. The same section of the Code requires the record of proceedings of each meeting to be read at the next succeeding meeting, corrected and approved, which record the president must sign and the clerk must attest.

In recognition of the vital importance of the clerk to the conduct of board business, Section 3313.23, Revised Code of Ohio, specifically requires:

> "If a clerk of a board of education is absent from any meeting of the board, the members present shall choose one of their number to serve in his place pro tempore."

The State Board of Education, acting pursuant to authority contained in Section 3301.07 (D), Revised Code of Ohio, in 1968, formulated and prescribed minimum standards for Ohio high schools. Standard EDb-403-07 thereof entitled, "Evalua-

tion and Research", prescribes the following specific minimum standard:

> "(J) It shall be the special responsibility of the principals to make periodic studies of the qualifications and performance of the teaching staff, to make the results available to the superintendent and the board of education, and to recommend ways to overcome weaknesses revealed."

In addition to the state minimum standards promulgated to implement the provisions of Section 3301.07, Revised Code of Ohio, the respondent, Board of Education, at a special meeting on February 28, 1968, amended its policies with respect to teacher visitation. The respondent's regulation, which is still in effect, reads as follows:

> "The Superintendent shall be responsible for the measurement of performance of the teaching staff, and in order that the school board will have a written record of this performance, and so that the teacher will be informed of any weakness noted, and so that the teacher can be counselled and indoctrinated with the present school philosophy, either the Assistant Superintendent, Principals or Supervisors shall visit each class at least once every semester, or oftener if necessary. A written report will be made by the administrator on the form prescribed at least once each semester. The results of the visitation shall be gone over with the teacher, and the teacher should initial the report. A copy of the report shall be put in the employee's folder, and a copy held for the Board's review. If in the administrator's opinion there are glaring weaknesses, another visit should be scheduled before six weeks."

During the last two school years preceding the filing of the petition, neither the superintendent nor the principal, nor any supervisor of the Wellston City School District, visited petitioner's classroom, nor prepared an evaluation form, nor reviewed an evaluation of the petitioner's performance as a teacher with him. The petitioner has had no notice of his deficiencies, if any, as a teacher nor an opportunity to cure his deficiencies, if any. In fact, petitioner, in 1968, secured his professional high school certificate from the State Department of Education based in part on the certification of the Superintendent of the Wellston City School District that petitioner was of good moral character and possessed of satisfactory scholastic and professional competency and per-

formance in the classroom.

By Section 3319.08, Revised Code of Ohio, contracts for the employment of teachers must be either limited or continuing. The statute defines a "limited" contract as one for a term of not to exceed five years, and a "continuing" contract as one which remains in effect until the teacher resigns, elects to retire or is retired, or until it is terminated or suspended. Section 3319.08 further provides that a "continuing" contract shall be granted only to teachers holding professional, permanent, or life certificates.

The employment of teachers eligible for continuing service status, which is defined by Section 3319.09 (C), Revised Code of Ohio, as "employment under a continuing contract", is governed by Section 3319.11, Revised Code of Ohio, as follows:

> *"Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district,* and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.
>
> Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. *The Superintendent may recommend re-employment of such teacher,* if continuing service status has not previously been attained elsewhere, *under a limited contract* for not to exceed two years, *provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April,* and provided that written notice from the board of education of its action on the superintendent's recommendation has been given to the teacher on or before the thirtieth day of April, but upon subsequent re-employment only a continuing contract may be entered into. *If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract* for not to exceed two years *before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the*

salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, *is, at the expiration of such limited contract, deemed re-employed under a continuing contract at the same salary plus any increment granted by the salary schedule,* unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of previous employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed, re-employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed re-employed under either a limited or continuing contract as the case may be under the provisions of this section." (Emphasis added.)

The respondent, Betty Saltsman, Clerk-Treasurer of the respondent, Board of Education, was absent from the meeting of April 13, 1970, when the Superintendent refused to recommend the re-employment of the petitioner. The members of the Board of Education present at the meeting did not choose one of their members to serve in her place, *pro tempore*, as required by Section 3313.23, Revised Code of Ohio. Yet, on April 14, 1970, the Board of Education, by the respondents, Vaughn H. Huffman and Betty Saltsman, purported to give written notice to the petitioner of the Board's intention not to re-employ petitioner at the expiration of his the current limited contract.

Petitioner appealed to the Court of Appeals for Jackson County from the judgment of the Court of Common Pleas dismissing his petition. On or about December 29, 1970, the Court of Appeals affirmed the judgment of the trial court. The judgment of the Court of Appeals was journalized on January 8, 1971.

As noted above, on May 26, 1971, the Supreme Court of Ohio overruled the petitioner's motions to certify and dismissed, sua sponte, the petitioner's appeal of right in the aforementioned case.

HOW FEDERAL QUESTION PRESENTED

The constitutional question here involved was first put in issue in the briefs and arguments before the Court of Appeals for Jackson County, Ohio, and again in the petitioner's memorandum in support of jurisdiction in the Supreme Court of Ohio in Case No. 71-45.

REASONS FOR GRANTING THE WRIT

To petitioner's knowledge, this Court has never considered the precise question raised in the case at bar. Courts are divided on the question of whether and what administrative procedural rights a nontenured public school teacher is entitled when he is not rehired. In fact, some authorities consider a decision not to renew a teacher's contract for the ensuing year the same as a dismissal during the school year. See the decision of the Rhode

Island Commissioner of Education, dated May 20, 1970, in the appeal of Michael A. Domenicone from the action by the School Committee of the Town of Smithfield (Appendix F, *infra* pp. 37-40); *Orr v. Trinter*, 318 F. Supp. 1041, 1045 (S.D. Ohio, 1970).

Some Courts say that a nontenured teacher has no right to an administrative hearing, although he does have a legal remedy if he was dismissed for constitutionally impermissible reasons such as his race or the exercise of First Amendment rights. See, *Freeman v. Gould Special School District of Lincoln County, Arkansas*, 405 F. (2d) 1153 (C.A. 8, 1969); *Brooks v. School District of City of Moberly, Missouri*, 267 F. (2d) 733 (C.A. 8, 1959). Others have held that a nontenured teacher is constitutionally entitled to a hearing even when there is no allegation that the decision not to rehire was made for constitutionally impermissible reasons. *Roth v. Board of Regents of State Colleges*, C.A. 7, No. 18490, decided July 1, 1971 (GERR No. 410, B-2), affirming 310 F. Supp. 972 (W.D. Wisc., 1970); *Gouge v. Joint School District No. 1*, 310 F. Supp. 984 (W.D. Wisc., 1970); *Klein v. Joint School District No. 1*, 310 F. Supp. 984 (W.D. Wisc., 1970); *Orr v. Trinter*, 318 F. Supp. 1041 (S.D. Ohio, 1970). Still others have said that a teacher is entitled to a written explanation of the reasons for nonretention, but that a hearing is not constitutionally compelled. *Drown v. Portsmouth School District*, 435 F. (2d) 1182 (C.A. 1, 1970). Others have required administrative hearings only when there is an allegation that a constitutionally impermissible reason motivated the decision not to rehire. *Ferguson v. Thomas*, 430 F. (2d) 852 (C.A. 5, 1970). The Fifth Circuit distinguishes between nontenured teachers who have an expectancy of re-employment and those who do not. Those with an expectancy of re-employment are entitled to the full procedural rights of a teacher with tenure. *Pred v. Board of Public Instruction*, 415 F. (2d) 851 (C.A. 5, 1969); *Sindermann v. Perry*, 430 F. (2d) 939 (C.A. 5, 1970); *Lucas, et al., v. Chapman, et al.*, 430 F. (2d) 945 (C.A. 5, 1970). Also see *Bomar v. Keyes*, 162 F. (2d) 136 (C.A. 2, 1947). The Fourth Circuit has held that a failure to rehire can be so arbitrary and capricious as to violate the nontenured teachers Fourteenth Amendment due process rights. *Johnson v. Branch*, 364 F. (2d) 177 (C.A. 4, 1966). As of June 16, 1971, the Sixth Circuit in No. 20721 reversed *Orr v. Trinter*, supra., and held that a failure

of a board of education to give a reason for the refusal to rehire or to grant a hearing in connection therewith, standing alone, is not constitutionally impermissible conduct. Cf. Auerbach v. Trustees of California State Colleges, D.C. Calif. No. 71-1126-F, decided August 18, 1971 (GERR No. 417, B-9).

Petitioner asserts that under any of the divergent views he is entitled to a written statement of the reasons for nonretention or termination and a hearing thereon.

Petitioner contends that in determining what, if any, procedures are required when a school board decides not to rehire a nontenured teacher requires a balancing of the competing interests of the teacher and the school board. From the viewpoint of the school board, its interest primarily is in its ability to insure the quality of the school system by employing teachers for a probationary period. During this period, the board attempts to evaluate teaching ability to determine if a teacher merits tenure. Certainly, a period of time is necessary in order to make this evaluation.

The teacher is in the position of having invested a substantial sum of money and years of effort in preparation for a career which depends mainly on the willingness of school boards to employ him. Such willingness is seriously dissipated, if not destroyed, when an employer refuses to rehire the teacher. If, as in the present case, the teacher, after nine years of apparently satisfactory performance, confronts a decision not to rehire him without any reason given, this effectively forecloses him from attempting any self-improvement, from correcting any false rumors, or from explaining any false impressions, from exposing any retributive effort infringing on his academic freedom and from minimizing or otherwise overcoming the reason or reasons in his discussions with a potential future employer.

From the standpoint of the teacher, if written reasons for refusal to rehire are given and an opportunity for hearing is afforded, he has an opportunity to correct a decision made on the basis of mistaken or false facts. Moreover, he may have evidence that could be used to support a claim that he was not rehired for constitutionally impermissible reasons. Additionally, the teacher would have the added benefit of knowing where his performance failed to live up to expectations. If the reason were to lie in a judgment that the teacher was too innovative and unconventional, this very fact might be turned into a recommendation in the eyes of another possible employer.

From the viewpoint of the school board, the requirement that it state its reasons for not rehiring a nontenured teacher would impose no significant administrative burden. This requirement should not significantly inhibit the board of ridding itself of incompetent teachers. Some states presently require their school boards to give nontenured teachers a statement of reasons; *e.g.*, Wash. Revised Code, Annotated, Section 28.67.070 (1964); Alaska Stat., Section 14.20.180 (a) (1962). Certainly, the regulations of the State Board of Education in Ohio and even the policy regulations of the respondent call for administrative evaluations of the performance of teachers by their supervisors with the view in mind of giving the teacher an opportunity to improve his or her performance.

In *Drown v. Portsmouth School District, et al.*, 435 F. (2d) 1182 (C.A. 1, 1970), the Court held that the interests of a nontenured teacher in knowing the basis of his nonretention are so substantial and that the inconvenience and disadvantages for a school board of supplying the information are so slight as to require a written explanation in some detail of the reasons for nonretention, together with access to evaluation reports in the teacher's personnel file. Also see, *Lucia v. Duggan, et al.*, 303 F. Supp. 112 (D.C. Mass., 1969), where a teacher in the Monson Public Schools who was originally hired for the 1966-67 school year had his contract terminated on January 30, 1969, without notice or reason. The Court found the plaintiff to be entitled to the benefits of his position as a teacher, including salary, unless and until he is lawfully separated from that position. The Court further found that the plaintiff was deprived of due process in that (1) he was not told what the charges against him were, and (2) a meeting of the board of education on January 30, 1969, improperly combined legislative and judicial procedures without affording the plaintiff a hearing.

Petitioner strongly urges that the failure of the respondents to evaluate his performance in accordance with the minimum standards for Ohio high schools, as prescribed by the State Board of Education, respecting teacher visitation coupled with the respondents' falure to give him reasons for terminating his employment, deprives him of procedural due process contrary to the Fourteenth Amendment to the Constitution of the United States.

In *Johnson v. Branch, et al.*, 364 F. (2d) 177 (C.A. 4, 1966), the plaintiff, a Negro teacher in a public high school for nearly

twelve years preceding her involvement in the civil rights movement was not rehired. Under the law of North Carolina, all teachers' contracts are for one year only, renewable at the discretion of the school authorities. The plaintiff's contract was not renewed. She then brought an action in the Federal District Court seeking reversal of the action of the school committee which refused to renew her contract of employment on the grounds that the school authorities acted in an arbitrary and capricious manner. The Court of Appeals, in reversing the dismissal of the action by the trial court said, *inter alia*, at page 180:

> "*** However wide the discretion of School Boards, it can not be exercised so as to arbitrarily deprive persons of their constitutional rights. Zimmerman v. Board of Education, 38 N.J. 65, 183 A. 2d 25, 27-28 (1962); Garner v. Board of Public Works, 341 U.S. 716, 725, 71 S. Ct. 909, 95 L. Ed. 1317 (1951).
>
> "This principle has often been applied in analogous situations. Torcasco v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961) Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957). In Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810 (1957), the Court said –
>
> We recognize the importance of leaving the States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such [a] way as to impinge on the freedom of political expression or association'.***"

The statute, Section 3319.11, Revised Code of Ohio, gives discretion to the school board in deciding whether or not to continue the employment of a teacher. Discretion means the exercise of judgment, not bias or capriciousness. Thus, it must be based upon fact and supported by reasoned analysis. Petitioner contends that the failure of the respondent, Board of Education, to give him notice and a statement of the reasons for not granting him a continuing contract when he had been employed by the respondent for nine years, had a degree of Master of Education, and had a professional high school certificate valid for eight years from and after September 1, 1968, and there had been no professional evaluation for over two years, renders the action of the respondent so arbitrary and capricious as to constitute a denial of due process.

Even if the Court adopts the reasonable expectancy of re-employment position espoused by the Fifth, Second and

Sixth Circuits, it is submitted that the petitioner had the necessary expectancy. In *Lucas, et a. v. Chapman, et al.*, 430 F. (2d) 945 (C.A. 5, 1970), involving an action by a teacher, whose contract had not been renewed, for reinstatement on the ground that the contract had not been renewed because of an exercise of free speech and a violation of procedural due process, the teacher had been in the system for eleven years and one year as a principal. The Court found that long employment in a continuing relationship through the use of renewals of short term contracts was sufficient to give the teacher the necessary expectancy of re-employment that constitutes a protectable interest. For this proposition the Court cited *Ferguson v. Thomas*, 430 F. (2d) 852 (C.A. 5, 1970); *Pred v. Board of Public Instruction*, 415 F. (2d) 851 (C.A. 5, 1969); *Greene v. Howard University*, 412 F. (2d) 1128 (C.A. D.C., 1969); *Johnson v. Branch*, 364 F. (2d) 177 (C.A. 4, 1966). At page 948, the Court observed, *inter alia* –

> "***If the board asserts a non-constitutional reason and the teacher claims it is a sham and that the real reason is one impinging on his constitutional rights, he must be afforded a hearing. Also, even in the area of non-constitutional reasons, the board's decision must not be wholly unsupported by evidence else it would be so arbitrary as to be a constitutional violation. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); United States ex rel. Vajtauer v. Commissioner of Immigration, 272 U.S. 103, 47 S. Ct. 302, 303 71 L. Ed. 560, 563 (1927)."

It is submitted that the petitioner in the case at bar, a teacher with nine years of experience in the respondent's school system the holder of a degree of Master's of Education, and a professional high school certificate good for eight years, who, by the statutes of Ohio, was entitled to a continuing contract, had the necessary expectancy of re-employment on a continuing contract which is a constitutionally protected interest. Accordingly, petitioner should have received, as he requested, a written statement of the reasons for his termination and a hearing thereon.

The rudiments of due process fair play in school administrative proceedings is outlined in *Ferguson v. Thomas*, 430 F. (2d) 852, 858 (C.A. 5, 1970), as follows:

> "***when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that:

"(a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist,

"(b) he be advised of the names and the nature of testimony of witness against him,

"(c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense,

"(d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.***"

Also see, *Orr v. Tinter*, 318 F. Supp. 1041, 1046 (S.D. Ohio, 1970).

Not only necessity, but practicability and the common sense fairness that rules in day to day dealings, requires that whether a teacher is to be terminated or is not to have his contract renewed, he should be told the reason, what supports the reason, and given an opportunity to present his side if he desires. Certainly, the rights of the individual teacher, of teachers in general, of the school system, and those taught in it, as well as the community, all coalesce in the desirability of notice and hearing at the local school level.

As shown by the second paragraph of Section 3319.11, Revised Code of Ohio, quoted above, when a teacher who is eligible for continuing service status is re-employed on a limited contract the superintendent is required to give the teacher notice of his intentions to make such a recommendation and to give the teacher reasons directed at the professional improvement of the teacher on or before the thirtieth day of April. Certainly, no less can be required when a teacher eligible for continuing service status is terminated or not re-employed on a continuing contract.

Plainly in the case at bar the petitioner has been given no statement of reasons for not giving him the continuing contract to which he is entitled, nor reasons for terminating his employment. Petitioner has been given no hearing at which he can respond to the reasons, if any, for terminating his employment or denying him a continuing contract. Clearly the decision of the respondent, Board of Education, rests upon a basis of which petitioner has never been notified and to which he has had no fair opportunity to respond. Thus, under the provisions of Section 3319.11, Revised Code of Ohio, as construed by the respondents and the state courts, petitioner

has been deprived of procedural due process. To this extent Section 3319.11 is unconstitutional, null and void.

CONCLUSION

In light of the divergent views expressed by state and federal courts respecting the procedural due process rights of non-tenured teachers and the interest of teachers, pupils, boards of education, and public generally, this Court should grant this petition. When the case comes before the Court on its merits, the Court should hold that a teacher is deprived of his property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States where a board of education terminates the employment of such teacher who has been employed by such board for nine years, holds a Master's of Education degree and holds a professional high school teaching certificate, following a meeting of such board, not in accordance with state law, without giving such teacher reasons for his discharge, or a hearing at which time the teacher can present evidence relating to such reasons, if any, prior to such termination.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LUCAS, PRENDERCAST, ALBRIGHT, GIBSON, BROWN & NEWMAN
By RANKIN M. GIBSON
42 East Gay Street
Columbus, Ohio 43215

Attorneys for Petitioner

APPENDIX A

COURT OF APPEALS, JACKSON COUNTY, OHIO

Ralph D. Crabtree,
Plaintiff-Appellant **No. 282**

vs.

Board of Education
Wellston City School District,
et. al.
Defendent-Appellees

OPINION

GRAY, P.J.:

This cause is in this court on appeal from a judgment of the Court of Common Pleas of Jackson County denying an injunction to plaintiff.

The plaintiff feeling aggrieved by this action of the trial court filed his notice of appeal and assigned the following errors:

"I. The Trail Court erred in finding that the decision made by the Board of Education at the April 13, 1970 meeting not to re-employ plaintiff was valid when the Clerk of the Board was absent and the members of the Board did not choose one of their members to serve as Clerk *pro-tempore*.

II. The trial court erred in finding that the notice of intention not to re-employ the plaintiff, dated April 14, 1970, was valid where the Board's determination not to re-employ the plaintiff was re-employ the plaintiff was reached at a meeting where the Clerk of the Board was absent and the members of the Board did not choose one of their members to serve as Clerk *pro tempore*.

III. The trial court erred in finding that a Board of Education may lawfully terminate the employment of a teacher eligible for a continuing contract on the mere recommendation of its Superintendent without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any."

The operative facts are as follows. Plaintiff was employed under a limited teacher's contract for a three year period commencing in 1967 and ending June 30, 1970.

The Superintendent of the Wellston City Schools, at a meeting of the Board of Education on April 13, 1970 recommended that plaintiff not be re-employed. A notice was given plaintiff on April 14, 1970 reflecting the action of the board.

The regular Clerk of the Board was not present at the meeting of April 13, 1970 and the board did not choose one of their number to serve in his place as required by Section 3313.23, Revised Code.

Mary Riley took notes of the meeting preparatory to the preparation of the minutes.

It is the contention of plaintiff that since the requirements of Section 3313.23 Revised Code were not met minutes of the meeting could not be prepared, the notice to the plaintiff was a nullity and under other related sections of the law plaintiff is entitled to a continuing contract.

Upon reading Section 3313.23 R.C. we do not find where the legislature has fixed any penalty in the case the board did not appoint one of their number pro tempore.

There is no claim that there were any errors in the minutes, in fact, plaintiff urges that the board has no right to record any minutes under the circumstances. Plaintiff's claim is that only the regular clerk or one elected under Section 3313.23 R.C. has the authority to record the minutes.

If an injunction were granted under the circumstances defendant board could never record and approve minutes or come within the ruling or philosophy of the Ohio Supreme Court as enunciated in Village of Vinson v. James, 108 Ohio St. 220.

Plaintiff contends for a result that is exceedingly harsh and one which would thwart the announced intention of the school superintendent and school board.

We believe that under the philosophy announced by the Supreme Court in Village of Vinton v. James, 108 Ohio St. 220 the school board should have a reasonable opportunity to make a record of their meeting of April 13, 1970 so that this court and any other court having jurisdiction of the matter could determine just what action was taken. It might develop that the action of plaintiff was prematurely brought.

The gist of this action as it appears to us is: What action was actually taken, by whom, how it was taken and the truthfulness

of the minutes. To put the stamp of our approval on the contention of plaintiff would be to exalt form over substance. We as a court are interested in what action was taken and the truthfulness of the minutes and not particularly in the fact who transcribed the minutes.

Carrying plaintiff's contention to its logical conclusion a board of education could never rectify an error in its minutes by later action because it failed to choose one of its number clerk when the regular clerk was absent.

The gist of petitioner's argument is that he is asking this court to permit him to secure a continuing contract by default. The criterion for the award of a continuing contract to him would be the alleged failure of the regular clerk to be present at a stated meeting of the defendant board and the failure to elect a clerk pro tem from the membership of the board. Certainly the General Assembly never intended such to be the standard for the employment of a teacher on a continuing contract.

It is interesting to note that in the third assignment of error that he advances as an error the alleged fact that the teacher was not rehired "without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any."

We believe that by the same virtue defendant board should be given an opportunity to exhibit to the courts of Ohio the minutes of the meeting pertaining to the teacher contract of plaintiff and that the philosophy of the Supreme Court as stated in Village of Vinton v. James, 108 Ohio St. 220 be given effect and that a contract for employment or non-employment not turn on the presence or absence of a particular person, the regular clerk at a meeting of the defendant board.

It is a generally recognized fact that members of school boards are laymen and have not been trained in the law.

We believe that plaintiff is attempting to read something into the section 3313.23 R.C. that isn't there. The legislature could have said that the failure of the board to appoint one of their number clerk pro tempore at a meeting where the regular clerk was absent, shall make any action taken by the board at such meeting a nullity. The legislature did not say such a thing. Neither do we. Plaintiff has not shown that he is entitled to injunctive relief, hence it will be denied and the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED

Abele & Stephenson, JJ concur

Lucas, Prendergast, Albright,
Gibson, Brown & Newman
Rankin M. Gibson, Esq.
42 East Gay Street
Columbus, Ohio 43215

Attorneys for Plaintiff-Appellant

Joseph A. Oths, Esq.
16 East Broadway
Wellston, Ohio

Attorney for Board of Education

M. D. Slavens, Esq.
167 Broadway
Jackson, Ohio

Attorney for Jasper C. Call
Defendants-Appellees

Concurring Opinion in
Crabtree v Board of Education

I concur in the majority opinion insofar as it goes, however, it does not go far enough. The appellant has entered as his third assignment of error the following:

> "The Trial Court Erred In Finding That A Board of Education May Lawfully Terminate The Employment of A Teacher Eligible For A Continuing Contract On The Mere Recommendation Of Its Superintendent Without Giving Such Teacher Notice Of The Cause For Termination On A Hearing, Nor An Opportunity To Cure His Deficiencies, If Any."

Pursuant to Section 2505.21 Revised Code, a reviewing court must pass on all errors assigned. The majority opinion does not appear to pass upon this issue raised by appellant.

The argument of appellant in support of this assignment of error insofar as it is claimed the Ohio statutes require a notice with reasons and opportunity to refute the reason as to why a teacher's contract is not being renewed is without merit. The notice under Section 3319.11 Revised Code to the teacher with reasons directed at professional improvement relates *solely* to the granting of two year limited contracts to a teacher otherwise eligible for a continuing contract.

The remaining argument of appellant urges that the due process clause of the United States Constitution requires "a teacher receives a statement of the reasons why the Board of Education does not intend to retain him, notice of a hearing at which he may respond to the stated reasons, and a hearing if he appears at the appointed time and place."

Support for appellant's contentions can be found. *Roth v Board of Regents of State College, 310 F. Supp. 972; Gouge v Joint School District No. 1, 310 F. Supp. 984 and Klein v. Joint School District No. 1, 310 F. Supp. 984.* All of these authorities are the decisions of one judge, namely, James E. Doyle, of the Federal District Court of Wisconsin. From a review of authorities, it would appear Judge Doyle has adopted a minority view.

In *De Canio v School Comm. of Boston, 260 N.E. 2d 676* the Supreme Judicial Court of Massachusetts summarized the cited authorities in the following manner:

> "In Roth v. Board of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wis), and later in Gouge v. Joint Sch. Dist. No. 1, 310 F. Supp. 984 (W.D. Wis), a United States District Court judge in Wisconsin held that under his interpretation of the holding of Cafeteria & Restaurant Wkrs. Union, Local 473 v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, a public school teacher or college professor, whether or not on tenure, cannot constitutionally be dismissed without notification of the reasons for the impending dismissal and the offer of a hearing. The gravamen of the holding in the Roth case was that "the decision not to retain a professor employed by a state university (or a teacher in a public elementary or secondary school as in the Gouge case) may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason," 310 F. Supp. at p. 979, and that given the requirement of a reason, the professor or teacher must be afforded the opportunity to contest its basis Id at P. 980."

In rejecting the reasoning of these authorities the court stated:

"Nor are we persuaded by the reasoning of the court in the Roth and Gouge cases. As the opinion in the Roth case recognized, "it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who has not yet won sufficient respect from his colleagues." 310 F. Supp. at pp. 978-979.

Such reasons are not amenable to proof at a hearing or to review by the judiciary. We therefore choose to follow the greater weight of authority."

In *Griffin v Board of Trustees of St. Mary's College 265 A 2d 757,* the Court of Appeals of Maryland in considering a claim of a college teacher that he was entitled to a statement of reasons why his contract was not being renewed stated the following:

"... Griffin concedes that he does not have tenure and that, absent the "statement of policy", the College had the right to elect not to renew his contract without a hearing and without giving him reasons therefor. His concession is in accord with the weight of authority. See Williams v. School District of Springfield R-12, 447 S.W. 2d 256, 270 (Mo. 1969); Bonner v. Texas City Indep. School District, 305 F. Supp. 600, 618 (S.D. Tex. 1969); and Parker v. Board of Education, 237 F. Supp. 222, 227 (D. Md. 1965), aff'd per curiam, 348 F. 2d464 (4th Cir. 1965)."

In *Parker v Board of Education of Prince George's County, Md. 237 F. Supp. 222* wherein the issue was raised as to the right to not renew the contract of a teacher who had not acquired tenure, the court states:

"Almost every case which ... considered the question supports the view that unless there is a statute to the contrary, probationary teacher's contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing."

Numerous cases are cited under footnote 5 in support of the above statement.

Under the Ohio statutory scheme of teacher employment, teachers are hired either under a limited contract for a specific number of years or a continuing contract wherein employment continues until retirement, suspension or removal for cause. Section 3319.08 Revised Code. A Board is not required to re-employ a teacher at the termination of a limited contract, subject to statutory notices of non-re-employment.

The difficulty in applying a due process concept to a nonrenewal of a limited contract is ascertaining what "right" must be procedurally protected. Absent tenure, a teacher's rights are dependent upon his contract and upon it's expiration, he has no vested rights under Ohio law to be re-employed. The relationship between the teacher and the Board is at an end. *Harrison v Board of Education* 13 O.O. 182 (App). Hence, no legitimate purpose is served by a requirement of charges and hearing.

Something might be said on appellant's behalf under due process as to the right of specific charges for non-renewal of contract and the opportunity of refutation where the claim is raised, which it is not in this case, that the decision to rehire was because of prior exercise of fundamental constitutional rights such as first amendment free speech. See *Pickering v Board of Education 391 U.S. 563; Williams v School District of Springfield 447 S.W. 2d 256; Williams v Sumter School Dist. No. 2, 255 F. Supp. 397.*

I am of the view the statutes under which the Board herein acted are constitional and are not violative of due process. The Supreme Court of Michigan has only recently reached a similar conclusion. *Munro v Elk Rapid Schools 383 Mich. 661, 178 N.W. 2d 450 (July 17, 1970).* I would specifically overrule the third assignment of error.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

Ralph D. Crabtree,
Appellant,

vs.

Board of Education, Wellston City School District et al.,
Appellees.

1971 TERM
To wit: May 26, 1971

No. 71-45
MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for JACKSON County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Lucas, Prendergast, Albright, Gibson, Brown & Newman _____

_____

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19___

_____ *Clerk*

_____ *Deputy*

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1971 TERM
To wit: May 26, 1971

Ralph D. Crabtree,
Appellant,

No. 71-45

MANDATE

vs.

Board of Education, Wellston City School District et al.,
Appellees.

To the Honorable COMMON PLEAS COURT
Within and for the County of JACKSON, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

THOMAS L. STARTZMAN,
Clerk

_____ 19___

_____

_____ *Deputy*

RECORD OF COSTS

Docket Fee . . . . . $ 20.00 Paid by Lucas, Prendergast, Albright, Gibson, Brown & Newman

Docket Fee . . . . . $_____ Paid by _____

Docket Fee . . . . . $_____ Paid by _____

Printing Record . . . . . $_____ Paid by _____

Supplemental Record . $_____ Paid by _____

Sheriff's Costs . . . . . $_____ Paid by _____

Sheriff's Costs . . . . . $_____ Paid by _____

APPENDIX D

IN THE COURT OF COMMON PLEAS, JACKSON COUNTY, OHIO

Ralph D. Crabtree
511 East Second Street
Wellston, Ohio 45692

Plaintiff

v. No. 19481

Board of Education
Wellston City School District
416 North Pennsylvania Avenue
Wellston, Ohio 45692

and

Vaughn H. Huffman, President
Wellston City Board of Education
South Pennsylvania Avenue
Wellston, Ohio 45692

and

Dan Lockard, Member of
Wellston City Board of Education
Route 2
Wellston, Ohio 45692

and

Joseph E. Christner, Member of
Wellston City Board of Education
North Ohio Avenue
Wellston, Ohio 45692

and

Jack Milliken, Member of
Wellston City Board of Education
Coalton, Ohio

and

Jasper C. Call, Member of
Wellston City Board of Education
509 East Second Street
Wellston, Ohio 45692

and

Betty Saltsman, Clerk-Treasurer of
Wellston City Board of Education
1315 South Vermont Avenue
Wellston, Ohio 45692

Defendants

PETITION

1. Ralph D. Crabtree, plaintiff herein, says that he is employed by the defendant, Board of Education, as a teacher in the Wellston High School within the Wellston City School District, and has been so employed for the past nine year; that he holds the degree of Masters of Education from Ohio University and holds a Professional High School Certificate No. 296-28-6840-8C from the State Department of Education, which is valid for eight years from September 1, 1968.

2. The Board of Education, Wellston City School District, defendant herein, is a corporate body as defined in Section 3313.17, Revised Code. The defendant, Vaughn H. Huffman, is the duly elected, qualified and acting President of the Wellston City Board of Education. The defendant, Dan Lockard, is a duly elected and qualified member of the Wellston City Board of Education. The defendant, Joseph E. Christner, is a duly elected and qualified member of the Wellston City Board of Education. The defendant, Jack Milliken, is a duly elected and qualified member of the Wellston City Board of Education. The defendant, Jasper C. Call, is a duly elected and qualified member of the Wellston City Board of Education. The defend-

ant, Betty Saltsman, is the duly appointed and qualified Clerk-Treasurer of the Wellston City Board of Education.

3. The plaintiff says that he is employed under a limited teacher's contract for a three year period commencing in 1967 and ending June 30, 1970; that under the provisions of Section 3319.11, Revised Code, he is eligible for a continuing service contract, having taught at least three years in the district within the last five years, and being the holder of a Professional High School Certificate from the State Department of Education.

4. Plaintiff further says that pursuant to authority conferred upon it by Section 3301.07, Revised Cide, the State Board of Education has formulated and prescribed minimum standards to be applied in all elementary and high schools in this State for the purpose of requiring a general education of high quality; that the State Board of Education has prescribed minimum standards for Ohio high schools; that by Standard EDb-403-07, entitled, "Evaluation and Research", the State Board of Education has prescribed the following minimum standard:

> "(J) It shall be the special responsibility of the principal to make periodic studies of the qualifications and performance of the teaching staff, to make the results available to the superintendent and the board of education, and to recommend ways to overcome weaknesses revealed."

5. The plaintiff further says that defendant, Board of Education, at a special meeting on February 28, 1966, amended its policies with respect to teacher visitation, which policy is still in effect, and reads as follows:

> "The Superintendent shall be responsible for the measurement of performance of the teaching staff, and in order that the school board will have a written record of this performance, and so that the teacher will be informed of any weakness noted, and so that the teacher can be counselled and indoctrinated with the present school philosophy, either the Assistant Superintendent, Principals or Supervisors shall visit each class at least once every semester, or oftener if necessary. A written report will be made by the administrator on the form prescribed at least once each semester. The results of the visitation shall be gone over with the teacher, and the teacher should initial the report. A copy of the report shall be put in the employee's folder, and a copy held for the Board's review. If in the adminis-

trator's opinion there are glaring weaknesses, another visit should be scheduled before six weeks."

6. Plaintiff says that notwithstanding the minimum standards for Ohio high schools as prescribed by the State Board of Education, and the amended policies of the defendant, Board of Education, respecting teacher visitation, as set forth above, neither the superintendent nor the principal, nor any supervisor has visited his class, nor prepared an evaluation form or reviewed an evaluation of his performance as a teacher with him during the last two school years; and that the recommendation of the Superintendent of the Wellston City Schools to the defendant, Board of Education, on April 13, 1970, not to re-employ plaintiff, was contrary to law, arbitrary, capricious and an abuse of discretion.

7. Plaintiff further says that the Superintendent of the Wellston City Schools at the meeting of the Board of Education on April 13, 1970, refused to recommend his re-employment, and that on or about April 14, 1970, the Board of Education, by the defendants, Vaughn H. Huffman and Betty Saltsman, purported to give written notice to the plaintiff of its intention not to re-employ him at the expiration of his current limited contract. Plaintiff says that the meeting of the defendant, Board of Education, on April 13, 1970, was illegal and of no effect because the defendant, Betty Saltsman, Clerk-Treasurer of the Board, was absent from the meeting, and the members of the Board of Education present did not choose one of their members to serve in her place, pro tempore, as required by Section 3313.23, Revised Code. Plaintiff further says that there being no properly appointed Clerk-Treasurer of the Board of Education present at the April 13, 1970, meeting, the notations then and there taken by a Mary Riley are null, void and of no effect. Plaintiff further says that no valid legal action having been taken on April 13, 1970, by the defendant, Board of Education, the notice of intention not to re-employ the plaintiff is null, void and of no effect.

8. Plaintiff further says that pursuant to Section 3313.26, Revised Code, notes made of a particular meeting of a Board of Education do not become minutes until they are approved and entered into the permanent record of such board at the next meeting, and that after such approval the President must sign the record and the Clerk attest it. Plaintiff says that defendant, Board of Education, is without authority to read and approve as

minutes notes taken by Mary Riley of a meeting held on April 13, 1970, when there was no lawfully appointed Clerk to take minutes of such meeting.

9. Plaintiff says that he has no adequate legal remedy for the injuries which he is about to suffer by reason of the illegal recommendation of the Superintendent of the Wellston City Schools and the illegal action thereon by the defendant, Board of Education, and the individual defendants.

WHEREFORE, the plaintiff prays that the defendants, and each of them, be temporarily enjoined –

(1) from reading, approving and attesting the minutes of the April 13, 1970, meeting of the Board of Education;

(2) that the notice of intention not to re-employ plaintiff by the defendant, Board of Education, dated April 14, 1970, be held void and without effect;

(3) that the plaintiff be deemed re-employed under a continuing contract at the same salary, plus any increment provided by the salary schedule, no written notice containing reasons directed at the professional improvement of the plaintiff having been given by the Superintendent of the Wellston City Schools of his intention to recommend that plaintiff be re-employed under a limited contract for not to exceed two years prior to April 30, 1970, and no lawful written notice of intention not to re-employ plaintiff having been given by the defendant, Board of Education, prior to April 30, 1970;

(4) that the defendants, and each of them, be temporarily enjoined to do or refrain from doing or performing any and all acts or omissions necessary and proper to implement these restraints and orders.

Plaintiff further prays that upon final hearing herein, the temporary injunction be made permanent; that he may have and recover his costs from the defendants herein; and that he may have all further relief to which he may be entitled in law or equity.

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN

By _____

Rankin M. Gibson
42 East Gay Street
Columbus, Ohio 43215
(614) 228-5711

Attorneys for Plaintiff

STATE OF OHIO
COUNTY OF FRANKLIN, ss:

Ralph D. Crabtree, being first duly sworn, says that he is the plaintiff herein; that he has read the foregoing Petition; and that the facts and allegations contained therein are true.

_____
Ralph D. Crabtree

Sworn to before me and subscribed in my presence this _____ day of May, 1970.

_____

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or perperty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REVISED CODE OF OHIO

§ 3313.18 Quorum. (GC§ 4834-1)

A majority of the members of a board of education shall constitute a quorum. Upon a motion to adopt a resolution authorizing the purchase or sale of real or personal property, or to employ a superintendent or teacher, janitor or other employee, or to elect or appoint an officer, or to pay any debt or claim, or to adopt any textbook, the clerk of the board shall publicly call the roll of the members composing the board and enter on the records the names of those voting "aye" and the names of those voting "no." If a majority of all the members of the board vote aye, the president shall declare the motion carried. Upon any motion or resolution, a member of the board may demand the yeas and nays, and thereupon the clerk shall call the roll and record the names of those voting "aye" and those voting "no." Each board may provide for the payment of superintendents, teachers, and other employees by payroll, but in all cases such roll call and record shall be complied with. Whenever a board of a city, exempted village, local, or county school district by a majority vote of its members has adopted an annual appropriation resolution, then such board may, by general resolution, dispense with the adoption of resolutions authorizing the purchase or sale or property, except real estate,

the employment, appointment or confirmation of officers and employees, except as otherwise provided for by law, the payment of debts or claims, the salaries of superintendents, teachers or other employees, if provision therefor is made in such annual appropriation resolution, or approving warrants for the payment of any claim from school funds, if the expenditure for which such warrant is issued, is provided for in such annual appropriation resolution.

§ 3313.22 Appointment of clerk.

The board of education of each local, exempted village, and city school district at an organization meeting shall elect a clerk who may be a member of the board and in the case of a local school district such clerk may be a teacher regularly employed as a teacher by such board. The clerk shall initially serve for a two-year probationary term and thereafter, if reappointed, shall serve for a four-year term. Such clerk may be removed at any time for cause by a two-thirds vote of the entire board. If reappointed as provided in this section the board shall execute a written contract of employment for such four-year term and each four-year term thereafter. In the case of a county board, the county superintendent shall act as clerk of such board, but the tenure and removal provision described in this section shall not apply to him.

§ 3313.23 Absence of clerk. (GC § 4834-2)

If a clerk of a board of education is absent from any meeting of the board the members present shall choose one of their number to serve in his place pro tempore.

§ 3313.26 Record of proceedings. (GC § 4834-3)

The clerk of the board of education shall record the proceedings of each meeting in a book to be provided by the board for that purpose, which shall be a public record. The record of proceedings at each meeting of the board shall be read at its next succeeding meeting, corrected and approved, which approval shall be noted in the proceedings. After such approval, the president shall sign the record and the clerk attest it.

§ 3319.08 Teacher employment and re-employment contracts.

The board of education of each city, exempted village, local, *and joint vocational* school district shall enter into written

contracts for the employment and reemployment of all teachers ♦. *The board of education of each city, exempted village, local, and joint vocational school district, which authorizes compensation in addition to the base salary stated in the teachers' salary schedule, for the performance of duties by a teacher which are in addition to the teacher's regular teaching duties, shall enter into a supplemental written contract with each teacher who is to perform additional duties. Such supplemental written contracts shall be limited contracts. Such written contracts and supplemental written contracts shall set forth the teacher's duties and shall specify the salaries and compensation to be paid for regular teaching duties and additional teaching duties, respectively, either or both of* which may be increased but not diminished during the term for which the contract is made, except as provided in section 3319.12 of the Revised Code.

If a board of education adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts such employment, the failure of such parties to execute a written contract shall not avoid such employment contract.

♦Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity, and for time lost due to illness or otherwise for not less than five days annually as authorized by regulations which each board of education shall adopt.

Contracts for the employment of teachers shall be of two types, limited contracts and continuing contracts. A limited contract for a superintendent is a contract for such term as authorized by section 3319.01 of the Revised Code, and for all other teachers for a term not to exceed five years. A continuing contract is a contract which shall remain in effect until the teacher resigns, elects to retire, or is retired pursuant to section 3307.37 of the Revised Code, or until it is terminated or suspended and shall be granted only to teachers holding professional, permanent, or life certificates. *This section applies only to contracts entered into after the effective date of this act.*

§ 3319.11 Continuing service status and contract; limited contract; failure of board or superintendent to act.

Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who

within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

Upon the recommendation of the superintendent that a teacher eligible for continuing service status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. The superintendent may recommend re-employment of such teacher, if continuing service status has not previously been attained elsewhere, under a limited contract for not to exceed two years, provided that written notice of the intention to make such recommendation has been given to the teacher with reasons directed at the professional improvement of the teacher on or before the thirtieth day of April, and provided that written notice from the board of education of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A teacher eligible for continuing contract status employed under an additional limited contract for not to exceed two years pursuant to written notice from the superintendent of his intention to make such recommendation, is, at the expiration of such limited contract, deemed re-employed under a continuing contract at the same salary plus any increment granted by the salary schedule, unless the employing board, acting on the superintendent's recommendation as to whether or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly.

A limited contract may be entered into by each board with each teacher who has not been in the employ of the board for at least three years and shall be entered into, regardless of length of pervious employment, with each teacher employed by the board who holds a provisional or temporary certificate.

Any teacher employed under a limited contract, and not eligible to be considered for a continuing contract, is, at the expiration of such limited contract, deemed, re-employed under the provisions of this section at the same salary plus any increment provided by the salary schedule unless the employing board, acting on the superintendent's recommendation as to whather or not the teacher should be re-employed, gives such teacher written notice of its intention not to re-employ him on or before the thirtieth day of April. Such teacher is presumed to have accepted such employment unless he notifies the board in writing to the contrary on or before the first day of June, and a written contract for the succeeding school year shall be executed accordingly. The failure of the parties to execute a written contract shall not void the automatic re-employment of such teacher.

The failure of a superintendent of schools to make a recommendation to the board of education under any of the conditions set forth in this section, or the failure of the board of education to give such teacher a written notice pursuant to this section shall not prejudice or prevent a teacher from being deemed re-employed under either a limited or continuing contract as the case may be under the provisions of this section.

APPENDIX F

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

Michael A. Domenicone

vs.

School Committee of the Town of Smithfield

DECISION

This matter was heard upon the appeal to the Commissioner of Education of Michael A. Domenicone, a teacher in the Smithfield School Department, from a decision of the Smithfield School Committee Denying his request for a hearing on the notification which he received that he was not to be engaged as a teacher in the Smithfield School Department for the next school year.

The Commissioner has jurisdiction to hear the appeal by virtue of Chapter 16-39 of the General Laws of Rhode Island, 1956, as Amended. Due notice was given to the interested parties of the time and place of the hearing. Both parties were represented by counsel. Testimony was taken, a transcript of which was made, and evidence was presented, and upon the testimony so taken and the evidence presented, we find the following:

1. The appellant is a non-tenure teacher in the Smithfield School Department.
2. The appellant has taught continuously in the Smithfield School Department since September, 1967.
3. The appellant was notified by letter dated February 13, 1970 from the Superintendent of Schools that the Smithfield School Committee had voted on February 5, 1970 not to renew the appellant's contract for the 1970-71 school year.
4. The appellant requested through his attorney in a letter

dated March 13, 1970 to the Chairman of the Smithfield School Committee a statement of charges against him and a hearing by the school committee on its decision not to renew the appellant's contract for the 1970-71 school year.

5. The appellant was notified in a letter dated March 19, 1970 from the legal counsel to the Smithfield School Committee addressed to the appellant's attorney that the appellant's request for a copy of the charges and a hearing had been denied.

Under Rhode Island law a ". . . school committee of any town may, on reasonable notice and a hearing of such teacher, dismiss any teacher for refusal to conform to the regulations by them made, or for other just cause; . . ." (Section 16-12-6, General Laws, 1956, as Amended). The law further provides that ". . . no teacher shall be dismissed unless he has received a written copy of the charge or charges against him not less than thirty (30) days before the meeting at which such charge or charges are to be considered, and unless the teacher if he so requests it has been given a hearing before said school committee, and unless the charge or charges has or have been admitted or substantiated; . . ," (Section 16-12-6, General Laws, 1956, as Amended).

The law also provides that "Teaching service shall be on the basis of an annual contract . . . and such contract shall be deemed to be continuous unless the governing body of the schools shall notify the teacher in writing (on or before March 1) that the contract for the ensuing year will not be renewed." (Section 16-13-2, General Laws, 1956, as Amended) and that a teacher who has given evidence of satisfactory teaching service for three successive years shall not be dismissed except for good and just cause. (Section 16-13-3, General Laws, 1956, as Amended.)

It is the position of the school committee that only such teachers who have acquired "tenure" according to the provisions of Section 16-13-3 of the General Laws are entitled to a hearing and a statement of charges. The school committee contends that the provisions of Section 16-12-6 of the General Laws apply only to a teacher who has been dismissed during the school year and does not apply to a teacher whose services are terminated at the end of the school year and whose contract has not been renewed for the ensuing year.

We do not hold with the school committee in this position. We believe that a "dismissal during a school year" and a "decision not to renew a contract for the ensuing year" are in each instance in fact a *dismissal* (emphasis ours), and that the only difference between the two is the point in time at which the termination of service occurs. Thus, it is our opinion that under the provisions of Section 16-12-6 of the General Laws, the appellant is entitled to a statement of the charge or charges and a hearing before the school committee as he has requested.

Moreover, it is our opinion that the due process provision of the Fourteenth Amendment to the Constitution of the United States (Article XIV, Section 1.) guarantees him the right to a statement of the charge or charges and a hearing before the school committee notwithstanding the omission of the provision for this in Section 16-13-2 of the General Laws. The provision in Section 16-13-3 of the General Laws which states that a teacher who has acquired tenure shall not be dismissed without good and just cause should not be construed to imply that a teacher who has not acquired tenure may be dismissed without cause.

To so construe the statute would indeed be to support a position that a school committee may act in an arbitrary, capricious, or unreasonable manner with impunity in the termination of a teacher's contract. This we cannot accept.

We believe, however, that the cause for the dismissal of a teacher who has not acquired tenure may very well be substantially different from the cause for the dismissal of a teacher who has acquired tenure. There is a presumption of competency of the tenure teacher which need not obtain for the non-tenure teacher.

A teacher in the public schools qualifies for his position only after having met standards established by the State which standards require years of professional preparation. Dismissal from his position, whether it be during a school year or at the end of a school year can mean the end of his professional career. Thus it is our opinion that simple justice as provided not only by the laws of this State but by the Constitution of the United States demands that he know the cause for dismissal or non-renewal of contract and have an opportunity to be heard on it.

Accordingly, the appeal of the appellant is sustained and the School Committee of the Town of Smithfield is hereby directed

to give the appellant a statement of the charge or charges against him and a hearing on them forthwith.

Commissioner of Education

May 20, 1970

FILE COPY

OCT 21 1971

E. ROBERT SEAVER, CLERK

No. 71-430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

RALPH D. CRABTREE,

Petitioner,

vs.

BOARD OF EDUCATION,
WELLSTON CITY SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to
The Supreme Court of Ohio

BRIEF FOR RESPONDENTS IN OPPOSITION

JOSEPH A. OTHS, ESQ.,
MARK A. FOLEY, ESQ.,
16 East Broadway,
Wellston, Ohio 45692
Attorneys for Respondents,
Board of Education, et al.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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On Petition for a Writ of Certiorari to The Supreme Court of Ohio

BRIEF FOR RESPONDENTS IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents pray that a writ of certiorari to review the judgment of the Supreme Court of Ohio be denied because the petition is not presented pursuant to the rules of this court and the claimed federal question was not adequately raised, considered and ruled upon in the courts below.

OPINIONS BELOW

The trial court wrote no opinion. Two opinions were written by the Court of Appeals of Jackson County, Ohio, the first being unreported (appendix A of petition), and the second (appendix B this brief) is reported

in 26 Ohio Appellate (2d) 237. The Supreme Court of Ohio wrote no opinion.

JURISDICTION

Jurisdiction is asserted by petitioner under Rule 19 of this Court and 28 U. S. C. 1257(3) under the provision that review by writ of certiorari is provided,

> "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

but not under the provision of 28 U. S. C. 1257(3),

> "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States."

QUESTIONS PRESENTED

I. Has petitioner presented his petition for Writ of Certiorari pursuant to the Rules of this Court?

II. Has the claimed federal question been adequately raised, considered and ruled upon in the State courts and by the Ohio State Supreme Court?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are adequately set forth in the petition.

STATEMENT OF THE CASE

The only facts in the case are contained in the petition filed in the Court of Common Pleas, Jackson County, Ohio, (App. D of Petition, PP. 26-31) which were admitted to be true for the purpose of deciding the motion, for an order dismissing said petition.

M. D. Slavens, Attorney for Jasper C. Call, has not entered an appearance since the trial court, and consequently is not an Attorney of Record in this petition.

Ralph D. Crabtree, (hereinafter referred to as "Petitioner") was employed by the Board of Education of The Wellston City School District (hereinafter referred to as "Board of Education") under a contract in 1967 which by its terms expired on June 30, 1970. (App. D of Petition P. 28). On September 1, 1968 Petitioner received a Professional High School Certificate (App. D of Petition P. 27) which made him eligible for a continuing contract for the first time for the 1970-1971 school year. (App. E of Petition P. 34, Ohio Revised Code Section 3319.08).

On April 13, 1970 at the regular meeting of the Board of Education the Superintendent of the Wellston City School (hereinafter called "Superintendent") refused to recommend that Petitioner be re-employed and on or about April 14, 1970 the Board of Education gave Petitioner written notice of its intention not to re-employ him after the expiration of his limited contract on June 30, 1970. (App. D of Petition P. 29).

The Clerk of the Board of Education was not present at the April 13, 1970 Board meeting and the Board of Education did not choose one of their members to serve in her place, but had a non-member of the Board of Education take the notes of the meeting (App. D of Petition P. 29).

Thereafter, Petitioner commenced an action in the Jackson County Court of Common Pleas asking that, Respondents be temporarily and permanently enjoined:

> "(1) from reading, approving and attesting the minutes of the April 13, 1970 meeting of the Board of Education;

'(2) That the notice of intention not to re-employ plaintiff by the defendant, Board of Education, dated April 14, 1970, be held void and without effect;

'(3) that the plaintiff be deemed re-employed under a continuing contract at the same salary, plus any increment provided by the salary schedule, no written notice containing reasons directed at the professional improvement of the plaintiff having been given by the Superintendent of the Wellston City Schools of his intention to recommend that plaintiff be re-employed under a limited contract for not to exceed two years prior to April 30, 1970, and no lawful written notice of intention not to re-employ plaintiff having been given by the defendant, Board of Education, prior to April 30, 1970;

'(4) that the defendants, and each of them, be temporarily enjoined to do or refrain from doing or performing any and all acts or omissions necessary and proper to implement these restraints and orders." (Appendix D of Petition Page 30)

The trial court entered judgment for Respondents and dismissed Petitioner's petition on May 18, 1970 (App. A). No evidence was presented in the case.[1]

On May 18, 1970 Petitioner filed his Notice of Appeal and thereafter filed his brief in the Court of Appeals, Jackson County, Ohio, stating three Assignments of Error:

I. The Trial Court erred in finding that the decision made by the Board of Education at the April 13, 1970 meeting not to re-employ Plaintiff was valid when the Clerk of the Board was absent and the

[1] For the Operative facts of the case as found by the Court of Appeals for Jackson County, Ohio in its opinion, See App. B, Page 16.

members of the Board of Education did not choose one of their members to serve as Clerk *Pro Tempore*.

II. The Trial Court erred in finding that the notice of intention not to re-employ the plaintiff, dated April 14, 1970, was valid where the Board's determination not to re-employ the Plaintiff was reached at a meeting where the Clerk of the Board was absent and the members of the Board did not choose one of their members to serve as Clerk *Pro Tempore*.

III. The Trial Court erred in finding that the Board of Education may lawfully terminate the employment of a teacher eligible for a continuing contract on the mere recommendation of its Superintendent without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any.

On the Eighth day of January, 1971, the Court of Appeals for Jackson County, Ohio filed its decision affirming the Trial Court, (App. A. of Petition, Pages 16-22), which was not reported, and thereafter filed an amended decision which is reported in *26 Ohio App. (2d) 237*, App. B.[2]

On January 13, 1971, Petitioner filed his notice of appeal, motion to certify and memorandum in support of jurisdiction in the Supreme Court of Ohio, wherein he stated the following propositions of law:

PROPOSITION OF LAW NO. I:

The Requirement of § 3313.23, Revised Code, That When A Clerk of A Board Of Education Is Absent From Any Meeting Of The Board, The Members Shall Choose One Of Their Members To Serve As Clerk *Pro Tempore* Is Mandatory. A Meeting Without Compliance With Such Mandatory Requirement Renders The Meeting Illegal

[2] While this case is reported, and the citation has been assigned, volume 26 Ohio App. (2d) has not at this time been published and is therefore appended to this brief.

PROPOSITION OF LAW NO. II:

The Notice of Intention Not To Re-employ A public School Teacher Is Null, Void And Without Effect Where The Determination Not To Re-employ Such Teacher Was Reached At A Meeting Illegal Because Of Failure To Comply With The Mandatory Requirements of § 3313.23, Revised Code

PROPOSITION OF LAW NO. III:

A Board Of Education Does Not Effectively Terminate The Employment Of A Teacher Eligible For A Continuing Contract Where It Acts Only On The Mere Recommendation Of Its Superintendent Without Giving The Teacher Notice Of The Cause For Termination, A Hearing, Or An Opportunity To Cure His Deficiencies, If Any.

On May 26, 1971, the Supreme Court of Ohio, without requiring oral argument, overruled the Petitioner's motion to certify (App. B of Petition, P. 23) and entered a judgment of dismissal, sua sponte, dismissing Petitioner's appeal as of right (App. C), and issued its mandate to the Court of Common Pleas, Jackson County, Ohio (App. C of Petition, P. 24).

On June 7, 1971 Petitioner filed his motion for rehearing, which motion was overruled on June 30, 1971, also without oral argument.

ARGUMENT

I

THIS PETITION IS NOT PRESENTED PURSUANT TO THE RULES OF THIS COURT.

This petition for writ of certiorari should be dismissed for failure of Petitioner to follow Rule 23 (1) (j) of this Court.

> "If review of the judgment or decree of a state court is sought, there shall be appended to the petition a copy of the judgment or decree in question and any order on rehearing"

Upon the record presented to this Court, by Petitioner (App. A, B, C, D of Petition Pages 16-31) and the jurisdictional statement contained in the Petition (Page 2) the last entry in this case was the order of the Supreme Court of Ohio entered on May 26, 1971 (App. B and C of Petition, Pages 23, 24). Petitioner has not appended the judgment of the Supreme Court dismissing the appeal nor the order denying rehearing.

II

THE CLAIMED FEDERAL QUESTION WAS NOT ADEQUATELY RAISED, CONSIDERED AND RULED UPON IN THE STATE COURTS AND BY THE OHIO STATE SUPREME COURT.

Petitioner must, in his statement of the case, specify at what stage in the case, and the manner in which the federal question sought to be reviewed was raised; and the manner in which it was passed upon by the court so as to show that the federal question was timely and properly raised and ruled upon. [*Rule 22(1)(f) of this Court.*] Petitioner has failed to do so. (Page 8 of Petition).

If this court should consider the record to see if the federal question was timely and properly raised, it would find that such is not the case. In the trial court, no constitutional question was raised. Before the Court of Appeals For Jackson County, Ohio (hereinafter referred to as Court of Appeals), the Petitioner attempted to raise a federal question in his Third Assignment of Error, wherein he stated:

> "The Trial Court erred in finding that a Board of Education may lawfully terminate the employment of a teacher eligible for a continuing contract on the mere recommendation of its superintendent without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies if any."

Thereafter, in his brief, the Petitioner argued that:

> "Minimal procedural due process under State and Federal Constitutions includes the requirement that a teacher receive a statement of the reasons why the Board of Education does not intend to retain him, notice of a hearing at which he may respond to the stated reasons, and a hearing if he appears at the appointed time and place."

However, this claim had no relation to the facts presented to the trial court.

The majority of the Court of Appeals, in its original opinion, considered Petitioner's contention to the extent of stating that:

> "It is interesting to note that in the third assignment of error that he (Petitioner) advances as an error the *alleged* fact that the teacher was not rehired without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any." (App. B of Petition, P. 18) (Emphasis supplied)

The majority of the Court of Appeals, in its revised opinion, also held an injunctive action did not lie as there was a "plain, adequate and complete remedy at law" and held:

> "For these reasons, plaintiff (Petitioner) has not shown that he is entitled to injunctive relief and has exhibited no prejudicial error among those assigned and argued. The judgment of the trial court is affirmed." (App. B, PP. 20, 21).

The Court of Appeals had before it the same facts as have been presented to this Court, those being contained in the petition filed in the trial court (App. D of Petition Pages 26-31). Upon examination of said petition, one finds that no request was made for a hearing or for reasons for non-renewal of Petitioner's contract of employment, or that the Board of Education in fact did not give reasons for non-renewal or a hearing as has been claimed by Petitioner in his petition to this Court (Pages 12, 13 and 15 of Petition). Thus the Court of Appeals made reference to the "alleged fact" that Petitioner was not rehired without giving him notice of cause for termination on a hearing or an opportunity to cure his deficiencies.

While Judge Stephenson in his separate opinion considered the constitutional questions which Petitioner attempted to raise, this must be considered as dictum. He does however, very adequately review the authorities and concludes that absent an allegation of prior exercise of fundamental constitutional rights, due process does not require the giving or reasons for non-renewal on a hearing. (App. B, P. 28)

Judge Stephenson was merely commenting upon a hypothetical question, as the "Assignment Of Error No. Three" was addressed to matters not part of the issues in the case. The decision of the majority of the Court of

Appeals was to the effect that an adequate remedy at law existed. A mere discussion of federal questions in the opinion of a state court is insufficient to give the Supreme Court jurisdiction to review, since the Supreme Court reviews the judgments of State Courts, and not statements in opinions *Black v. Cutter Laboratories (1956) 351 U.S. 292, 100 L ed 1188, 176 S. Ct. 824.*

Upon appeal to the Supreme Court of Ohio, the Petitioner advanced his constitutional claim in his Proposition of Law No. III, wherein he stated:

> "A Board of Education does not effectively terminate the employment of a teacher eligible for a continuing contract where it acts only on the mere recommendation of its superintendent without giving the teacher notice of the cause for termination, a hearing, or an opportunity to cure his deficiencies if any."

Thereafter, in his brief, Petitioner again argued that:

> "Minimal procedural due process under both State and Federal Constitutions includes the requirement that a teacher receive a statement of the reasons why the Board of Education does not intend to retain him, notice of a hearing at which he may respond to the stated reasons and a hearing if he appears at the appointed time and place."

However, as was pointed out in respondents brief before the supreme Court of Ohio, the Petitioner failed to follow *Rule V of the Supreme Court of Ohio* which states:

> "V. The appellants brief *must* comply *with* Rule VI and contain
>
> A. . . . . .
>
> E. An appendix containing (a) a copy of the notice of appeal to the Supreme Court, (b) a copy of the judgment or order appealed from, (c) copies of all judgments, orders, and opinions rendered by any

court or board in the case, (d) complete copies of any unreported case cited, (e) the rules or regulations of any department, board, commission or any other agency relied upon, (such rules shall be set forth in full, or if too voluminous, a copy thereof shall be furnished with each copy of the brief), and *(f) a copy of any statute or constitutional provision relied upon to be construed, or otherwise involved in the case.* (emphasis supplied)

Petitioner did not include any constitutional provisions either State or Federal in his brief.

On May 25, 1971, the Supreme Court of Ohio dismissed the appeal as of right, without opinion, for the reason that "no substantial constitutional question exists herein." (App. C)

This decision could have been based on any of the following grounds:

a. for failure to comply with Rule V of the Supreme Court of Ohio,
b. injunctive relief is improper, there being an adequate remedy at law,
c. the constitutional question was not properly raised in the trial court,
d. procedural due process applies to a deprivation of life, liberty, or property, and the right to specific employment is not property.
e. petitioners constitutional challenge is to § 3319.11, Ohio Revised Code, and not to procedural due process.

If the Supreme Court of Ohio's decision was for any of the above reasons, then Petitioner's jurisdictional claim under *28 U.S. C. 1257(3)*:

"where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States."

is not shown, said federal question not having been timely raised and ruled upon. *Street v. New York 394 U.S. 576, 226 Ed 2nd 572, 89 S. Ct. 1354.*

It should be pointed out, that throughout the appeal of this case in the State Courts, and now before this Court, Respondent has failed to clearly define the issues, and follow the prescribed rules of procedure. This Court has before it all the facts of the case, no evidence having been presented, and a petition which claims jurisdiction under *28 U.S. C. 1257(3)* due to infringement of a privilege guaranteed by the 14th Amendment. But Petitioner goes to great lengths arguing that *Section 3319.11 Ohio Revised Code* is repugnant to the Constitution of The United States. (Petition pp. 14, 15)

As has been pointed out, by the record presented in the petition (App. A, B, C, D of the Petition Pages 16 to 31), and even if this court would consider Respondent's Appx. C, the judgment entry of the Supreme Court of Ohio, which petitioner has failed to include in his petition as required by *Rule 23(1)(J) of this Court*, the action is not filed within the time prescribed by law. In addition, Petitioner has not shown that the federal question presented was timely raised and ruled upon in the State Court *(Rule 22 of this Court). Street v. New York, supra.*

Even if this court should pass over these glaring errors and consider the record of the case, it would find that it is so amorphous and inadequate that it does not permit adjudication. *Ellis v. Dixon 349 U.S. 458, 99 L ed 1231, 75 S. Ct. 850.*

The rule has been laid down that the jurisdiction of the U.S. Supreme Court to re-examine the final judgment of the State Court, can not arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up for

review intended to assert a Federal right. *Oxley Stove Co. v. Butler Co. (1897) 166 U.S. 648.*

CONCLUSION

For the above reason, the petition for Writ of Certiorari should be denied.

JOSEPH A. OTHS, ESQ.
MARK A. FOLEY, ESQ.
16 East Broadway
Wellston, Ohio 45692
Attorneys for Respondents.

APPENDIX A

IN THE COURT OF COMMON PLEAS, JACKSON COUNTY, OHIO

No. 19481

RALPH D. CRABTREE,

Plaintiff,

v.

BOARD OF EDUCATION
WELLSTON CITY SCHOOL DISTRICT, ET AL.,

Defendants.

JOURNAL ENTRY

[Filed May 18, 1970]

This day this cause came on for hearing upon (1) the positively verified petition of the plaintiff and his motion for a temporary injunction and restraining order; (2) the admissions of the truth of the facts stated in the plaintiff's petition by the defendant, Jasper C. Call, member of the Wellston City Board of Education, and his consent to the entry of an injunction as prayed for by the plaintiff; (3) the motion of the defendants, other than Jasper C. Call, for an order dismissing the petition herein; and (4) the arguments of counsel.

The Court, being fully advised in the premises, finds the facts to be as alleged in the petition herein but is of the opinion, and so finds, that under the law and the facts that plaintiff is not entitled to an injunction of any character.

It is therefore Ordered, Adjudged and Decreed that

judgment be, and it hereby is, granted in favor of the defendants, other than Jasper C. Call, and that the petition herein be, and it hereby is, dismissed all at the plaintiff's costs.

Exceptions reserved to the plaintiff and to the defendant, Jasper C. Call.

/s/ T. W. MITCHELL,
Judge.

Approved:

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN
By RANKIN M. GIBSON
Attorneys for Plaintiff
Presented under Rule but not approved
JOSEPH A. OTHS
Attorney for Defendants
Other Than Jasper C. Call
/s/ M. D. SLAVENS
Attorney for Jasper C. Call

APPENDIX B

COURT OF APPEALS, JACKSON COUNTY, OHIO

No. 282

RALPH D. CRABTREE,
Plaintiff-Appellant,

vs.

BOARD OF EDUCATION, WELLSTON CITY SCHOOL DISTRICT, ET AL.,
Defendant-Appellees.

GRAY, P.J.:

OPINION

This cause is in this court on appeal from a judgment of the Court of Common Pleas of Jackson County denying an injunction to plaintiff.

The plaintiff, *appellant herein*, feeling aggrieved by this action of the trial court filed his notice of appeal and assigned the following errors:

> "1. The trial court erred in finding that the decision made by the board of education at the April 13, 1970 meeting not to re-employ plaintiff was valid when the Clerk of the Board was absent and the members of the Board did not choose one of their members to serve as Clerk pro-tempore.
> 2. The trial court erred in finding that the notice of intention not to re-employ the plaintiff, dated April 14, 1970, was valid where the board's determination not to re-employ the plaintiff was reached at a meeting where the Clerk of the Board was absent and the members of the Board did not choose one of their members to serve as Clerk pro tempore.

3. The trial court erred in finding that a Board of Education may lawfully terminate the employment of a teacher eligible for a continuing contract on the mere recommendation of its Superintendent without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any."

The operative facts are as follows. Plaintiff was employed under a limited teacher's contract for a three-year period commencing in 1967 and ending June 30, 1970.

The superintendent of the Wellston city schools, at a meeting of the Board of Education on April 13, 1970 recommended that plaintiff not be re-employed. A notice was given plaintiff on April 14, 1970 reflecting the action of the board.

The regular clerk of the board was not present at the meeting of April 13, 1970 and the board did not choose one of their number to serve in his place as required by R.C. 3313.23.

Mary Riley took notes of the meeting preparatory to the preparation of the minutes.

It is the contention of plaintiff that since the requirements of R.C. 3313.23 were not met, minutes of the meeting could not be prepared, the notice to the plaintiff was a nullity and under other related sections of the law plaintiff is entitled to a continuing contract.

Upon reading R.C. 3313.23, we do not find that the Legislature has fixed any penalty in cases where a board does not appoint one of their number pro tempore.

There is no claim that there were any errors in the minutes. In fact, plaintiff urges that the board has no right to record any minutes under the circumstances. Plaintiff's claim is that only the regular clerk or one elected under R.C. 3313.23 has the authority to record the minutes.

If an injunction were granted under the circumstances, defendant board could never record and approve minutes or come within the ruling or philosophy of the Ohio Supreme Court as enunciated in Village of Vinton v. James 108 Ohio St. 220.

Plaintiff contends for a result that is exceedingly harsh and one which would thwart the announced intention of the school superintendent and school board.

We believe that under the prudent rule announced by the Supreme Court in Village of Vinton v. James, supra, the school board should have a reasonable opportunity to make a record of their meeting of April 13, 1970 so that this court and any other court having jurisdiction of the matter could determine just what action was taken. It might develop that the action of plaintiff was prematurely brought.

The gist of this action as it appears to us is as follows. What action was actually taken? How and by whom was such action taken? What is the truthfulness of the minutes? To put our stamp of approval on the contention of plaintiff would be to exalt form over substance. We as a court are interested in what action was taken and the truthfulness of the minutes and not particularly in the question of who transcribed the minutes.

Carrying plaintiff's contention to its logical conclusion, a board of education could never rectify an error in its minutes by later action if it failed to appoint a clerk from one of its number when the regular clerk was absent.

The gist of petitioner's argument is that he is asking this court to permit him to secure a continuing contract by default. The criterion for the award of a continuing contract to him would be the alleged failure of the regular clerk to be present at a stated meeting of the defendant board and the failure to elect a clerk pro tem

from the membership of the board. Certainly the General Assembly never intended such to be the standard for the employment of a teacher on a continuing contract.

It is interesting to note that in the third assignment of error petitioner argues that the employment was terminated "without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any."

We believe that by the same virtue defendant board should be given an opportunity to exhibit to the courts of Ohio the minutes of the meeting pertaining to the teacher contract of plaintiff and that the wise and logical rule announced by the Supreme Court as stated in Village of Vinton v. James, 108 Ohio St. 220 be given effect and that the validity of the contract for employment not turn on the presence or absence of a particular person, such as the regular clerk, at a meeting of the board of education.

It is a generally recognized fact that most members of school boards are laymen and have not been trained in the law.

We believe that plaintiff is attempting to read something into R.C. 3313.23, that isn't there. The Legislature could have said that the failure of a board to appoint one of their number clerk pro tempore at a meeting where the regular clerk was absent, shall make any action taken by the board at such meeting a nullity. The legislature did not say such a thing. Neither do we.

As a general rule resort should be had to remedies provided by statute before other remedies are sought.

Where the statute prescribes a particular mode of review of an adminisative action or decision, a litigant must; if aggrieved by the decision of the administrative agency, seek a judicial review in the manner prescribed

and may not invoke the original jurisdiction of a court by an independent proceeding. Thus an independent proceeding such as an action for injunctive relief is not permissible where an appeal from the action of an administrative agency is provided by statute as it is above. Plaintiff had a plain, adequate and complete remedy at law and has therefore suffered no irreparable injury. Accordingly, his petition has not stated a cause of action.

The law of Ohio as it pertains to this question has been enunciated by the Supreme Court in the following cases.

The syllabus of Perkins v. Village of Quaker City, 165 Ohio St. 120 establishes that an "injunction is an *extraordinary* remedy." (Emphasis added)

At page 125 of the opinion, Judge Zimmerman said: "The authorities are agreed that injunction is an extraordinary remedy equitable in nature, and that its issuance may not be demanded as a matter of strict right."

O'Neill, J. speaking for the court in State, ex rel Pressley v. Ind. Comm. 11 Ohio St. 2d 141, 153 said:

> "The answer is simple. The right of appeal provided by Chapter 2506, Revised Code, is a plain and adequate remedy in the *ordinary course of the law*, while the injunctive relief provided in Section 2727.1 et seq. and the mandamus relief provided in Section 2731.01 et seq. are extraordinary remedies not in the ordinary course of the law."

See opinion of Paul Herbert, J. in State, ex rel Sibarco Corp. v. Berea, 7 Ohio St. 2d 85.

In the present case the point has been made that the majority of the court did not pass upon the third assignment of error. In the first draft of the opinion that was released we stated "Plaintiff has not shown that he is entitled to injunctive relief, hence it will be denied and the judgment of the trial court affirmed." In this draft of the opinion we say: "For these reasons plaintiff has not

shown that he is entitled to injunctive relief and has exhibited no prejudicial error among those assigned and argued. The judgment of the trial court is affirmed." We believe that thereby we have passed upon all of the assignments of error.

Our research has turned up the case of Freeman v. The State of Ohio, 131 Ohio St. 85, which we think is dispositive of this question herein presented. The court at pages 88 and 89 said:

> "Counsel for plaintiff in error devotes three pages of his brief to a claimed error committed by the Court of Appeals in failing to write an opinion stating upon what principles of law the case was decided by the appellate court. While in many cases opinions may be desirable for the benefit of Bench and Bar, there is neither constitutional nor statutory provision requiring the appellate court to write an opinion. Where opinions of the lower courts are available, this court has passed a rule requiring plaintiffs in error to submit the opinions of the lower courts with their briefs; but this does not mean that they are required to write opinions. Counsel for defendant relies entirely upon Section 12248, General Code. That section merely provides that errors assigned and pointed out by brief shall be considered by the appellate court; and that, in case of reversal and remand, the Court of Appeals shall state the error upon which the judgment of reversal was founded. This is done by journal entry. In any event, when the judgment of the trial court is affirmed, as in the present case, the last clause referred to cannot possibly apply."

The Supreme Court cited 12248 G.C., supra. This section is now embodied in R. C. 2505.21.

It has also been suggested that an opinion should not and could not be revised under the facts of this case. Let us see what an opinion is. An opinion does not consti-

tute a judgment or order and forms no part of the record. It is not a paper in a case. The court speaks through its entries and not through its opinions.

This is a case of first impression in Ohio in regard to the applicability of Chapter 2506 to the particular facts of this case. We make a point of it because we believe that the provisions of Chapter 2506 R.C. are dispositive of the question involved herein.

For these reasons plaintiff has not shown that he is entitled to injunctive relief and has exihibted no prejudicial error among those assigned and argued. The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

Abele, J. concurs; Stephenson, J. concurs in part and dissents in part

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN

RANKIN M. GIBSON — *Counsel for Appellant*

M. D. SLAVENS — *Counsel for Appellee*

JOSEPH OTHS — *Counsel for Appellee*

STEPHENSON, J., Concurring in Part and Dissenting in Part:

I concur in the judgment of affirmance herein and in the majority opinion, in so far as it goes, except I must respectfully dissent to the inclusion therein as a reason for the affirmance of the judgment that the appellant had an adequate remedy at law pursuant to Chapter 2506 Revised Code.

The majority opinion herein is an amended opinion and is not the majority opinion originally filed in this case. The original opinion, filed December 29, 1970, in which I concurred by separate concurring opinion, did not set forth the ground in question. It did not because that issue was not raised in the trial court nor urged or argued in this court nor considered by this court in the rendition of the original opinion.

The record reveals that thereafter on January 8, 1971 in response to the original opinion an entry, in general form and without setting forth reasons, was filed for journalization affirming the judgment of the trial court. On January 14 ,1971, a notice of appeal to the Ohio Supreme Court was filed stating, in essence, that a substantial constitutional question and a question of great general and public interest was presented in the appeal to that court.

Subsequent thereto, the original majority opinion was, sua sponte, amended by inclusion of the reason of the applicability of Chapter 2506 Revised Code. The judgment was not vacated and re-entered. The term of court for Jackson County elapsed prior to filing the amended opinion.

Aside from the question of lack of jurisdiction by expiration of the term, I am of the view that, even assum-

ing authority to do so, an opinion should not be so amended.

The term "opinion" is universally defined as a statement of reasons delivered by a judge or court for the giving of the judgment in that case. See *Vol 29, Words and Phrases, P. 589.* The reasons for the judgment that was entered in this case had no reference to Chapter 2506 and, hence, the latter was not a "reason" for entry of the judgment.

In my view, intolerable confusion will result from amending opinions after judgment on new and distinct grounds not argued or originally considered in the entry of the judgment. If an opinion may, with propriety, be amended as done here at this late date, at what definitive point in the future may it not be amended? The uncertainty such a procedure could generate is obvious and particularly is this so in view of the decision of the Ohio Supreme Court in *Andrews v Board of Liquor Control, 164 O.S. 275,* that when, as here, the judgment entry does not disclose the grounds upon which the judgment is founded, resort may be had to the opinion of the lower court to ascertain those grounds. See also *Pennington v Dudley 10 O.S. 2d 90.* Additionally, the injustice of such a procedure to a losing party is readily apparent inasmuch as the judgment is already entered, an application for reconsideration pursuant to Section 2505.271 Revised Code and Rule VII of the Rules of the Courts of Appeals is precluded. Thus, as an end result of the procedure here adopted, the losing party is denied any opportunity to brief, argue, or otherwise present his views and authorities upon what the majority describes as a "dispositive" issue in the appeal.

I can only conclude that inclusion of the ground in question is improper and it represents, at most, an after-

thought of a ground that could have, but was not, utilized as a reason for the judgment.

I concur in the remainder of the opinion, except I believe we should go further and specifically pass upon the third assignment of error. The appellant has entered as his third assignment of error the following:

> "The Trial Court Erred In Finding That A Board of Education May Lawfully Terminate The Employment of A Teacher Eligible For A Continuing Contract On the Mere Recommendation of Its Superintendent Without Giving Such Teacher Notice Of The Cause For Termination On a Hearing, Nor An Opportunity To Cure His Deficiencies, If Any."

The argument of appellant in support of this assignment of error, insofar as it is claimed the Ohio statutes require a notice with reasons and opportunity to refute the reason as to why a teacher's contract is not being renewed, is without merit. The notice under Section 3319.11 Revised Code to the teacher with reasons directed at professional improvement relates *solely* to the granting of two year limited contracts to a teacher otherwise eligible for a continuing contract.

The remaining argument of appellant urges that the due process clause of the United States Constitution requires "a teacher receives a statement of the reason why the Board of Education does not intend to retain him, notice of a hearing at which he may respond to the stated reasons, and a hearing if he appears at the appointed time and place."

Support for appellant's contentions can be found. *Roth v Board of Regents of State College, 310 F. Supp. 972; Gouge v Joint School District No. 1, 310 F. Supp. 984 and Klein v Joint School District No. 310 F. Supp. 984.* All of these authorities are the decisions of one judge,

namely, James E. Doyle, of the Federal District Court of Wisconsin. From a review of authorities, it would appear Judge Doyle has adopted a minority view.

In *De Canio v School Comm. of Boston, 260 N.E. 2d 676,* the Supreme Judicial Court of Massachusetts summarized the cited authorities in the following manner:

> "In Roth v Board of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wis), and later in Gouge v Joint Sch. Dist. No. 1, 310 F. Supp. 984 (W.D. Wis), a United States District Court judge in Wisconsin held that under his interpretation of the holding of Cafeteria & Restaurant Wkrs. Union, Local 473 v McElroy, 367 U.S. 886, 81 S.Ct. 1743, a public school teacher or college professor, whether or not on tenure, cannot constitutionally be dismissed without notification of the reasons for the impending dismissal and the offer of a hearing. The gravamen of the holding in the Roth case was that "the decision not to retain a professor employed by a state university (or a teacher in a public elementary or secondary school as in the Gouge case) may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason, "310 F. Supp. at p. 979, and that given the requirement of a reason, the professor or teacher must be afforded the opportunity to contest its basis, Id at P. 980."

In rejecting the reasoning of these authorities the court stated:

> "Nor are we persuaded by the reasoning of the court in the Roth and Gouge cases. As the opinion in the Roth case recognized, "it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who has not yet won sufficient respect from his colleagues." 310 F. Supp. at pp. 978-979.
> Such reasons are not amenable to proof at a hear-

ing or to review by the judiciary. We therefore choose to follow the greater weight of authority."

In *Griffin v Board of Trustees of St. Mary's College 265 A 2 757*, the Court of Appeals of Maryland in considering a claim of a college teacher that he was entitled to a statement of reasons why his contract was not being renewed stated the following:

> "'. . . Griffin concedes that he does not have tenure and that, absent the "statement of policy", the College had the right to elect not to renew his contract without a hearing and without giving him reasons therefor. His concession is in accord with the weight of authority. See Williams v School District of Springfield R-12, 447 S.W. 2d 256, 270 (Mo. 1969); Bonner v Texas City Indep. School District, 305 F. Supp. 600, 618 (S.D. Tex. 1969); and Parker v Board of Education, 237 F. Supp. 222, 227 (D. Md. 1965) aff'd per curiam, 348 F. 2d 464 (4th Cir. 1965)."

In *Parker v Board of Education of Prince George's County, Md. 237 F. Supp. 222*, wherein the issue was raised as to the right to not renew the contract of a teacher who had not acquired tenure, the court states:

> "Almost every case which has considered the question supports the view that unless there is a statute to the contrary, probationary teacher's contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing."

Numerous cases are cited under footnote 5 in support of the above statement.

Under the Ohio statutory scheme of teacher employment, teachers are hired either under a limited contract for a specific number of years or a continuing contract wherein employment continues until retirement, sus-

pension or removal for cause. Section 3319.08 Revised Code. A board is not required to re-employ a teacher at the termination of a limited contract, subject to statutory notices of non-re-employment.

The difficulty in applying a due process concept to a non-renewal of a limited contract is ascertaining what "right" must be procedurally protected. Absent tenure, a teacher's rights are dependent upon his contract and upon its expiration, he has no vested rights under Ohio law to be re-employed. The relationship between the teacher and the Board is at an end. *Harrison v Board of Education 13 O.O. 182 (App).* Hence, no legitimate purpose is served by a requirement of charges and hearing.

Something might be said on appellant's behalf under due process as to the right of specific charges for non-renewal of contract and the opportunity of refutation where the claim is raised, which it is not in this case, that the decision to rehire was because of prior exercise of fundamental constitutional rights such as first amendment free speech. See *Pickering v Board of Education 391 U.S. 563; Williams v School District of Springfield 447 S.W. 2d 256; Williams v Sumter School Dist. No. 2, 255 F. Supp. 397.*

I am of the view the statutes under which the Board herein acted are constitutional and are not violative of due process. The Supreme Court of Michigan has only recently reached a similar conclusion. *Munro v Elk Rapid Schools 383 Mich. 661, 178 N.W. 2d 450* (July 17, 1970). I would specifically overrule the third assignment of error.

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1971 TERM
)
City of Columbus.) To wit: May 26, 1971

No. 71-45

RALPH D. CRABTREE,
Appellant,

vs.

BOARD OF EDUCATION, WELLSTON CITY SCHOOL DISTRICT, ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS, JACKSON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Jackson County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Jackson County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of

Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ___ day of _____, 19___.

_____Clerk

_____Deputy